UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD
REGION 22

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800 RIVER ROAD OPERATING COMPANY, LLC d/b/a WOODCREST HEALTH CARE CENTER

Employer

Case 22-RC-073078

v.

1199 SEIU, UNITED HEALTHCARE WORKERS EAST

Petitioner

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PETITIONER'S OPPOSITION TO THE EMPLOYER'S EXCEPTIONS TO THE HEARING OFFICER'S REPORT ON OBJECTIONS

PRELIMINARY STATEMENT

1199 SEIU United Healthcare Workers East ("Union"), by its attorneys Gladstein, Reif & Meginniss, LLP, submits this brief in opposition to 800 River Road Operating Company, LLC d/b/a Woodcrest Health Care Center's ("Employer") Exceptions to the Hearing Officer's Report on Objections ("Exceptions").

On January 23, 2012[1], the Union filed a representation petition to represent a unit of non-professional employees of the Employer. On February 6, the parties entered into a stipulated election agreement which was approved by the Acting Regional Director on February 7. The election was conducted on March 9 and the tally of ballots showed that of approximately 214 eligible voters, 122 were cast for the Union and 81 were cast against the Union, with two challenged ballots. On March 16, the Employer filed 12 Objections to the election. On April 17,

[1] All dates refer to 2012 unless otherwise indicated.

the Acting Regional Director issued a Report on Objections and Notice of Hearing ("Notice of Hearing") recommending that Objections 3 through 12 be overruled[2]. However, the Acting Regional Director ordered a hearing on Objections 1 and 2, which allege objectionable prounion conduct by supervisors during the critical period. Accordingly, a hearing was held on May 10, 11 and 14.

On May 14, after having presented ten witnesses, the Employer withdrew from the hearing, asserting that procedural errors by the Hearing Officer irrevocably prejudiced the Employer's ability to present evidence in support of its Objections. On June 4, the Hearing Officer issued his Report on Objections ("Hearing Officer's Report") which recommends that Objections 1 and 2 be overruled based on the Employer's failure to prove objectionable conduct. On June 26, the Employer filed its Exceptions.

It is well settled that representation elections are not lightly set aside. There is a strong presumption that ballots cast express employees' true desires. Accordingly, the burden of proof placed on a party seeking to set aside an election is a heavy one. *Delta Brands, Inc.*, 344 NLRB 252-53 (2005). The burden of proof on objecting parties is particularly heavy where the margin of victory is significant. *Avis-Rent-A-Car System*, 280 NLRB 580, 581, 582 (1986); *see also Robert Orr-Sysco Food Serv.*, 338 NLRB 614, 615 (2002) (Board overruled the hearing officer's recommendation because the hearing officer failed to sufficiently take into consideration the margin of victory in the election).

Because the Employer failed to present any evidence supporting its Objections and because the Hearing Officer committed no prejudicial error, the Hearing Officer's Report should

[2] On July 2, the Board adopted the Acting Regional Director's findings and recommendations and ordered that Objections 3 through 12 be overruled.

be adopted and, given that the Board has overruled the Employer's Objections 3-12, the Union should be certified as the bargaining representative.

ARGUMENT

A. The Board Should Adopt the Hearing Officer's Recommendation to Overrule Objection 1 Because the Employer Failed to Provide Any Evidence in Support of Its Claim That Supervisors Solicited Union Authorization Cards.

Objection 1 alleges that three supervisors, Janet Lewis, Bonita Thornton, and Jane Cordero, engaged in objectionable conduct by soliciting union authorization cards. In support of this Objection, the Employer claimed that several employees had knowledge that the three named supervisors "actively and frequently" were involved in the circulation and solicitation of Union authorization cards. Notice of Hearing at 2. Despite these claims, the Employer failed to present any evidence supporting these allegations.

At the hearing, the Employer called Lewis, Cordero, and Thornton as witnesses and each denied distributing or soliciting union authorization cards. Tr. 163-64, 271:6-14, 378:1-14. Rather, as noted by the Hearing Officer, the credible testimony contradicted the allegations raised in the Objections. Hearing Officer's Report at 11. The Employer presented no witness with direct knowledge of facts supporting Objection 1. In fact, the other witnesses called by the Employer denied having any knowledge of supervisors soliciting Union authorization cards. For example, Remi Sajimi testified that she never observed Supervisor Lewis having anything to do with authorization cards. Tr. 363:18-24[3]. For this reason, the Hearing Officer correctly concluded that the Employer failed to present any direct evidence of objectionable conduct. Hearing Officer's Report at 6.

[3] Page references preceded by "Tr." are to the official transcript of the hearing held on May 10, 11 and 14.

In its Exceptions, the Employer provides no basis upon which to reject the Hearing Officer's recommendation that Objection 1 be overruled. The Employer does not challenge the credibility of Lewis, Cordero, Thornton, or Sajimi, nor does the Employer contend that it was prevented from calling any witnesses that had knowledge relating to Objection 1. Rather, the Employer's Exceptions focus on the Hearing Officer's rulings with respect to the testimony and conduct of Israel Vergel de Dios, the Director of Environmental Services, the subject of Objection 2.

For the aforementioned reasons, the Board should adopt the Hearing Officer's recommendation to overrule Objection 1.

B. The Board Should Adopt the Hearing Officer's Recommendation to Overrule Objection 2 Because the Hearing Officer Properly Denied the Employer's Request for Additional Subpoenas.

Objection 2 alleges that supervisors Cordero, Thornton and Vergel de Dios engaged in prounion conduct during the critical period. In support of this Objection, the Employer claimed to have witnesses with direct knowledge of prounion conduct by these supervisors. Notice of Hearing at 3. However, at the hearing, the Employer failed to present any direct evidence supporting these allegations. Hearing Officer's Report at 6. After the Employer was unable to solicit helpful testimony from its first seven witnesses, midway through the second day of the hearing, the Employer requested six additional subpoenas in order to call Environmental Services employees as witnesses. Because the Employer had no idea whether these employees had any information about the Objections, the Hearing Officer properly denied the Employer's subpoena request.

The Board has repeatedly held that a Hearing Officer has discretion to revoke or refuse to enforce subpoenas that are being used as part of a "fishing expedition" or that would lead to irrelevant or cumulative testimony. *See e.g., Burns Int'l Sec. Serv. Inc.*, 278 NLRB 565 (1986);

Spartan Dep't Stores, 140 NLRB 608 (1963). In *Burns*, the employer claimed prejudicial error based on the Hearing Officer's decision to revoke witness subpoenas that the employer claimed were critical to the presentation of its case. *Burns*, 278 NLRB at 565-66. The Board held that the Hearing Officer properly revoked the subpoenas based on the employer's failure to introduce any evidence supporting its claims and because it was clear that the subpoenas would be a "mere fishing expedition." *Id.* at 566. Similarly, in *Spartan Dep't Stores*, the Board rejected the union's claim that the Hearing Officer committed prejudicial error by refusing to delay the hearing in order to enforce the subpoenas. *Spartan Dep't Stores*, 140 NLRB at 608, fn 2. Instead, the Board held that the Hearing Officer's decision not to enforce the subpoenas was appropriate given that the union failed to offer any evidence that the testimony sought would help develop its case. *Id.* at fn. 2. The Board determined that to allow the Board's subpoena powers to be manipulated in this way would be contrary to the policies of the Act. *Id.*

The Board has also recognized the power of the Hearing Officer to prevent a party from calling additional witnesses when previous testimony failed to support the alleged objections. *See Sears Roebuck Employees' Council,* 112 NLRB 559 (1955). In *Sears Roebuck*, the employer claimed prejudicial error based on the Hearing Officer's decision to prohibit the employer from calling additional witnesses on a particular subject. *Id.* at fn. 1. The Board found no merit to the employer's claim. Instead, the Board determined it was appropriate for the Hearing Officer to prohibit additional witnesses since the employer's previous five witnesses had provided no evidence in support of the objections and because the employer had no knowledge of what the testimony of the remaining witnesses would be. *Id.* According to the Board, a party is not entitled to call additional witnesses just because it "hoped" their examination would elicit useful testimony. *Id.* There is no meaningful difference between refusing to allow further

witnesses from testifying and refusing to issue additional witness subpoenas. Both are appropriate and necessary tools that a Hearing Officer can use to prevent a party from abusing the Board's policies and procedures.

Here, the Employer requested six additional subpoenas after having examined seven witnesses, none of whom provided testimony in support of the Objections[4]. Despite the lack of evidence, the Hearing Officer did not refuse to issue the subpoenas outright but rather required the Employer to make an offer of proof as to the testimony that the six Environmental Services employees would provide. Tr. 338:6-8. The Employer could make no such offer of proof. Rather, the Employer admitted that it did not know what the witnesses would say and did not even know whether the witnesses had any "factually based knowledge" related to the Objections. Tr. 339:18-24,341:10-13. It is precisely this kind of fishing expedition that the Hearing Officer is empowered to prevent.

Despite the Employer's inability to make an offer of proof related to the requested subpoenas, the Hearing Officer reserved ruling on whether or not to issue the subpoenas until the Employer had the opportunity to call additional witnesses for whom the Employer had made an offer of proof. The Employer proceeded to call Cartney Ezyk, Remi Sajimi, and Bonita Thornton, its eighth, ninth, and tenth witnesses. As with the first seven, these witnesses failed to provide any evidence in support of the Objections, despite the Employer's specific offers of proof to the contrary[5]. It was only after these witnesses failed to provide any evidence

[4] As properly noted by the Hearing Officer, much of the Employer's examination of these witnesses focused on topics entirely tangential to the Objections. Hearing Officer's Report at 6. A review of the record suggests that the Employer was using the hearing to gather information related to pending litigation between the Employer and former employees of the Employer rather than to prove objectionable conduct. In fact, the Employer's direct examination of witnesses was at times so far afield from the Objections that the Hearing Officer resorted to asking questions directly related to the Objections. Tr. 329:6-22.

[5] For example, the Employer claimed that Sajimi had direct knowledge that supervisor Cordero was recruiting employees to attend Union meetings. Tr. 345-46. However, Sajimi had no such knowledge. Tr. 363:8-17.

supporting the Employer's Objections that the Hearing Officer denied the Employer's request for additional subpoenas. The Hearing Officer refused to issue additional subpoenas because the subpoenas were purely exploratory in nature and because the Employer could make no offer of proof that the witnesses had specific knowledge related to the Objections. Tr. 383:21-25,384:1-3.

The Hearing Officer's denial of the requested subpoenas was entirely appropriate. Here, as in *Sears Roebuck*, the Employer had ample opportunity, through the examination of ten witnesses and the right to call additional witnesses, to provide evidence in support of its Objections. The Hearing Officer clearly has discretion to limit additional witnesses for whom no offer of proof could be made. At no time did the Hearing Officer prevent the Employer from calling witnesses it had already subpoenaed and for whom the Employer could make an offer of proof. Tr. 385:18-22. In fact, the Hearing Officer was prepared to hear testimony from five additional unnamed witnesses that the Employer claimed had direct knowledge of objectionable conduct. Tr. 385:18-22. However, the Employer withdrew from the Hearing without calling these witnesses. The only reasonable explanation for the Employer's failure to call these witnesses is that they did not in fact have knowledge of objectionable conduct[6]. The Employer's decision to withdraw from the Hearing based on claims of procedural errors by the Hearing Officer appears to be a desperate attempt to manufacture an issue for appeal[7].

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[6] The Employer claims that it failed to call these witnesses because of the Hearing Officer's prejudicial rulings and because of a "campaign of intimidation" at the Employer's facility directed at employees who cooperated with the Employer. Exceptions at 25. Any claim of intimidation is completely unsubstantiated and does not relieve the Employer of its burden to prove objectionable conduct. Furthermore, the Hearing Officer's ruling had no impact on the Employer's ability to call these witnesses. In fact, had the Employer presented *any witness* with direct evidence of objectionable conduct, the Hearing Officer would likely have granted additional subpoenas.

[7] The record clearly establishes that, over the persistent objections of Union counsel, the Hearing Officer granted the Employer substantial leeway throughout the hearing by allowing the Employer to ask numerous questions related to topics entirely tangential to the Objections and by permitting the Employer to ask many leading questions.

In its Exceptions, the Employer also claims that it required last-minute secretive subpoenas for Environmental Services employees in order to establish that Vergel de Dios engaged in a "cover-up" by which he told employees what to say in the event that they were subpoenaed. Exceptions at 15. Any claim that Vergel de Dios told employees what to say if they were subpoenaed is entirely unsubstantiated. The record is void of any evidence even suggesting that Vergel de Dios tainted any potential testimony of employees. Rather, the record makes clear that employees told Vergel de Dios that they supported him and would tell the truth if questioned by management. Tr. 103-104. However, counsel for the Employer argued that because some Environmental Services employees exercised their *Johnny's Poultry* rights, by declining to meet with the Employer's counsel after the election, the Employer had a "reasonable belief" that these employees had factual knowledge of objectionable conduct. Tr. 342-43. In effect, the Employer claims that because these employees exercised their legal rights, they had something to hide. Such a claim is outrageous. Moreover, the serving of subpoenas on employees on the basis that they exercised their *Johnny's Poultry* rights would constitute a separate violation of the Act. Finally, claims of an alleged cover-up are entirely tangential to whether the Employer in fact had evidence that Vergel de Dios engaged in objectionable prounion conduct.

Because the Hearing Officer properly refused to provide the Employer with additional exploratory subpoenas, the Board should adopt the Hearing Officer's recommendation that Objection 2 be overruled.

C. The Board Should Adopt the Hearing Officer's Recommendation That Objection 2 Be Overruled Because the Employer Failed to Allege That Supervisors Engaged in Any Objectionable Prounion Conduct.

In Objection 2, the Employer alleges that three supervisors, Vergel de Dios, Cordero and Thornton, actively supported the Union. All three supervisors denied engaging in any prounion conduct and the Employer failed to present any direct evidence to support its Objection. In its Exceptions, the Employer does not challenge the credibility of Cordero or Thornton, nor does it suggest that it was precluded from calling any witnesses with direct knowledge of prounion activity by Cordero or Thornton. Rather, the Employer claims that error by the Hearing Officer prevented the Employer from establishing that Vergel de Dios engaged in prounion conduct. However, none of the alleged statements by Vergel de Dios are objectionable and, even if proven, would have been insufficient to sustain the Employer's Objections. For this reason, any alleged error by the Hearing Officer was harmless.

It is well-established that prounion speech by a supervisor, without more, is not objectionable. *Harborside Healthcare Inc.*, 343 NLRB 906 (2004) (to be objectionable, prounion conduct must reasonably tend to coerce or interfere with employees' free choice); *see also Pacific Physicians Serv., Inc.*, 313 NLRB 1176 (1994) (not objectionable for supervisors to tell employees that union would mean better pay, benefits and job protection because prounion statements are no more suspicious than antiunion statements). Because expressing an opinion about the benefits of unionization is not inherently coercive, supervisors are free to express personal opinions, even strong ones, for or against unionization. *See e.g. Northeast Iowa Tel. Co*., 346 NLRB 465 (2006); *NLRB v. J.S. Carambola, LLP*, 2012 WL 91229 (3d Cir. 2012) (affirming Board Decision that it is not objectionable for a supervisor to tell employees "if you don't vote for the Union, you are a stupid ass" because this was a personal opinion). The Board

also recognizes that prounion statements by supervisors are even less likely to be coercive when the employer's opposition to the union is clear. *See Pacific Physician Serv.,* 313 NLRB at 1176.

Here, none of the statements attributed to Vergel de Dios are objectionable.[8] Specifically, the Employer claims that Vergel de Dios engaged in objectionable conduct by telling at least one unit employee that how he voted was up to him, and by telling employees that they were unappreciated and undercompensated. Tr. 114-115. These allegations are simply insufficient to support an objection. Supervisors are allowed to speak in favor of the union and the Board has specifically held that supervisors can tell employees that the union will lead to better benefits or that employees should vote for the union. *Pacific Physician Serv. Inc.,* 313 NLRB at 1176. Furthermore, here, any prounion statement by a supervisor would be even less likely to coerce employees given that the Employer engaged in an aggressive antiunion campaign in the weeks and months leading up to the election[9]. *Id.*

Therefore, the Employer's allegations with respect to Vergel de Dios's prounion conduct are unobjectionable and should not have been scheduled for hearing. For this reason, any alleged error by the Hearing Officer was not prejudicial to the Employer's case.

[8] The Employer clearly did not understand that prounion speech by supervisors is not per se objectionable. In fact, at the hearing counsel for the Employer suggested that a supervisor telling an employee that, "If I were the one voting, I would research the Union myself and vote based on what was right for me" was objectionable because it was "divorced from what the Employer message was." Tr. 352:20-25. This is simply not the standard for objectionable prounion conduct.

[9] It is undisputed that the Employer engaged in a "robust" antiunion campaign. Hearing Officer's Report at 8, fn. 5. Lorri Senk testified that the Employer regularly communicated to employees that it was strongly opposed to the Union and that management held many dozens of meetings with the majority of employees on work time to communicate the Employer's antiunion position. Tr. 224-27. Senk also testified that she spoke to each and every employee to express her opposition to the Union and that in the days before the election, antiunion meetings were held at the Employer's facility "around the clock." Tr. 229-335; s*ee also* Union Exhibit 1(a)-(d) (Employer's antiunion literature).

CONCLUSION

For all of the foregoing reasons, the Union respectfully requests that the Board adopt the Hearing Officer's Report and overrule the Employer's Objections 1 and 2.

Dated: New York, New York
July 12, 2012

Respectfully Submitted,

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CERTIFICATE OF SERVICE

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